

Before the
Administrative Hearing Commission
State of Missouri



DIRECTOR OF DEPARTMENT
OF PUBLIC SAFETY,

Petitioner,

vs.

DANIEL S. SPRADLING,

Respondent.

No. 13-1957 PO

DECISION

Daniel S. Spradling is subject to discipline because he committed the criminal offenses of domestic assault and assault in the third degree.

Procedure

On November 13, 2013, the Director of the Department of Public Safety ("Director") filed a complaint seeking to discipline Spradling. On November 18, 2013, we served Spradling with a copy of the complaint and our notice of complaint/notice of hearing by certified mail. On February 3, 2014, Spradling filed a motion to dismiss or in the alternative, for a more definite statement, and/or to strike. On February 18, 2014, the Director filed a motion to file an amended complaint. By order dated March 4, 2014, we denied Spradling's motion and granted the Director's motion. We deemed the amended complaint filed on February 18, 2014, and ordered Spradling to file an answer within ten days after the date of our order.

On April 11, 2014, we held a hearing on the complaint. Assistant Attorney General Ron Dreisilker represented the Director. Lynette M. Petruska, with Pleban & Associates, LLC, represented Spradling. The matter became ready for our decision on August 19, 2014, the date the last written argument was filed.

On August 26, 2014, the case was transferred to Commissioner Karen A. Winn, who, having read the full record including all the evidence, renders the decision. Section 536.080.2;¹ *Angelos v. State Bd. of Regis'n for the Healing Arts*, 90 S.W.3d 189 (Mo. App., S.D. 2002).

Findings of Fact

1. Spradling is licensed as a peace officer by the Department of Public Safety. This license is current and active and was so at all relevant times.
2. On January 24, 2013, Spradling and his wife, Ashley Crow, went out to dinner with friends, visited two other bars, and then went to Spradling's friend's house.
3. Throughout the night, Spradling drank alcohol heavily to the point where he appeared intoxicated and slurred his speech. Crow consumed approximately five alcoholic beverages between 7:00 p.m. and midnight. She stopped drinking around midnight on January 25, 2013, because she was driving.
4. Spradling and Crow returned home between 3:30 and 4:15 a.m. on January 25, 2013. Crow was not intoxicated at this time. Spradling began texting friends and wanted to go to another party, but Crow said no.
5. Both Spradling and Crow went to sleep on their living room couch before Crow decided to go to the bedroom to sleep.

¹ RSMo 2000. Statutory references, unless otherwise noted, are to the 2013 Supplement to the Revised Statutes of Missouri.

6. Before going to the bedroom, Crow checked Spradling's cell phone to see who he was texting. She found that he and his friend were discussing Spradling "hook[ing] up" with another woman. Tr. at 13.

7. Crow woke Spradling and confronted him about these text messages. Spradling stood up, took the cell phone out of Crow's hand, and threw it across the room. The phone bounced off the wall, but did not break. Spradling made a "growling" noise at Crow and shoved her. Tr. at 37. She stumbled back two steps. Spradling was angry, and Crow was afraid of him and offended by his actions.

8. Crow informed Spradling that she was going to leave the house. Spradling grabbed both Crow's wrists and pinned her against the wall to prevent her from leaving. The contact was not very forceful. Crow did not sustain bruising and was not otherwise injured. Tr. at 16.

9. When Crow again stated that she was leaving the house, Spradling opened the door, threw Crow's shoes outside, and told her, "[F]ine, get the fuck out." Tr. at 16. When Crow told Spradling she was going to call the police, he said that they were his friends and would not believe her. Tr. at 62.

10. Crow went back in briefly to get her dog and her purse, and she took them with her to her car. She called her mother to tell her she was coming over to her mother's house. Spradling ran out of the house towards the car. At the end of the driveway, Spradling punched Crow's front passenger window, leaving a smudge mark the size of a fist on the window. The window was not damaged.

11. Crow drove to the front of the neighborhood, stopped her car, and called the police.

12. Corporal David Finke, with the Jefferson County, Missouri, Sheriff's Department, was dispatched to the scene. He arrived approximately 14 minutes after he was dispatched and discussed the situation with Crow. Crow did not appear intoxicated to Finke.

13. Finke called for another officer to respond, then the three of them drove to the residence. Finke entered the house and found Spradling asleep in the bedroom. Finke woke Spradling and asked him for his version of the events. Spradling appeared intoxicated to Finke. Spradling was slurring his speech and had a difficult time focusing.

14. Spradling told Finke that Crow and Spradling simply had an argument. He denied touching Crow, but admitted that he punched her car window.

15. Finke arrested Spradling for domestic assault.

16. Three days later, Crow contacted Finke and attempted to get the charges dropped. She denied that the events described above had happened.

17. Before they divorced in November 2013, Spradling and Crow had several discussions about whether to reconcile.

Conclusions of Law

We have jurisdiction to hear this case. Sections 590.080 and 621.045. The Director bears the burden of proving that Spradling's license is subject to discipline by a preponderance of the evidence, *see Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-30 (Mo. App., W.D. 2012) (dental licensing board demonstrates "cause" to discipline by showing preponderance of evidence). A preponderance of the evidence is evidence showing, as a whole, that "the fact to be proved [is] more probable than not." *Schumer v. Lee*, 404 S.W.3d 443, 448 (Mo. App., W.D. 2013).

I. Objection to Testimony

Spradling objected to Crow's testimony about what he said to her after the incident because it was hearsay. The Director argued that Spradling's statement was an admission against interest. We took the objection with the case and allowed Crow to answer the questions. The parties failed to address this issue in their written arguments.

The court in *Hemphill v. Pollina*, 400 S.W.3d 409 (Mo. App., W.D. 2013), set forth the requirements for a statement by a party-opponent to qualify as an admission against interest:

- (1) [it must be] a conscious or voluntary acknowledgment by a party-opponent of the existence of certain facts;
- (2) the matter acknowledged must be relevant to the cause of the party offering the admission; and
- (3) the matter acknowledged must be unfavorable to, or inconsistent with, the position now taken by the party-opponent.

Id. at 414.

Crow testified that Spradling asked her to have the case “thrown out” so he could go back to work. Tr. at 19. We agree that this statement is not an admission against interest. Spradling’s position is that he did not commit the conduct for which the Director seeks to discipline him. Whether he asked his wife to withdraw the charges so he could go back to work is irrelevant to this ultimate issue. The Director appeared to use the testimony to bolster Crow’s credibility if questioned as to why she tried to have the charges dropped.

We sustain the objection and disregard what Crow testified Spradling asked her to do. We accept the testimony that she withdrew the charges “so he could have his job back” (Tr. at 21) without regard to whether Spradling asked her to do so.

II. Spradling’s Failure to Testify

Spradling did not testify at the hearing. This is not a criminal case, and we may consider this fact. *Gregory v. Director of Revenue*, 172 S.W.3d 930 (Mo. App., S.D. 2005); *In re S.M.B., Jr.*, 254 S.W.3d 214 (Mo. App., S.D. 2008). “It is well settled that the failure of a party having knowledge of the facts and circumstances vitally affecting the issues on trial to testify in his own behalf . . . raises a strong presumption that such testimony would have been unfavorable and

damaging to the party who fails to proffer the same.” *Stringer v. Reed*, 544 S.W.2d 69, 74 (Mo. App., Spr. D. 1976) (quoting *Bean v. Riddle*, 423 S.W.2d 709, 720 (Mo. 1968)).

Spradling argues we cannot draw the inference because he was available for the Director to call as a witness. He cites *Johnson v. Missouri Bd. of Nursing Adm’rs*, 130 S.W.3d 619, 627-32 (Mo. App., W.D. 2004), a case in which the court allowed the negative inference from Johnson’s assertion of her right against self-incrimination. Spradling also cites *Williams v. Casualty Reciprocal Exchange*, 929 S.W.2d 802 (Mo. App., W.D. 1996). In that case, the court focused on whether the non-party witness was equally available to be called by both parties. *Id.* at 805-08.

The Director argues that Spradling was not equally available to him, but we believe the analysis is simpler than that. The discussion in *Johnson* did not focus on Johnson’s availability to be called as a witness or answer certain questions, but on whether the negative inference was impermissible in light of her constitutional rights. Courts analyze the “equal availability” of witnesses when considering the impact of a non-party witness’ failure to testify. For example, in *State ex. Rel. Div. of Family Services v. Brown*, 897 S.W.2d 154 (Mo. App., S.D. 1995), the court did not focus on the availability of the party who did not testify. The court noted that the party was present and that his failure to testify “in his own behalf raises a strong presumption that such testimony would have been unfavorable and damaging to such party.” *Id.* at 159. Likewise, in *Gregory*, there was no discussion of availability. The court merely noted that Gregory did not testify at trial, with a footnote citing language from *Brown* and *Stringer* allowing the negative inference. *Gregory*, 172 S.W.3d at 931 n.2. Finally, in *Smith v. Director of Revenue*, 77 S.W.3d 120 (Mo. App., W.D. 2002), the court stated:

In these actions, the director’s burden is to establish her case by a preponderance of the evidence, and she is free to draw inferences

from an arrestee's failure to testify and to present evidence and even to call the arrestee as a hostile witness in making her case.

Id. at 122. That language offers a choice of two options to an opposing party – draw the negative inference from the party's failure to testify, or subpoena the party as a witness. Under Spradling's argument, the opposing party would not have the first option set forth by the court.

We infer that Spradling's failure to testify raises a strong presumption that his testimony would have been unfavorable and damaging to him. This cannot be the only reason to find for the Director; it merely adds weight to the Director's case and aids in measuring credibility. *Stringer*, 544 S.W.2d at 74.

III. Crow's Credibility

This Commission must judge the credibility of witnesses, and we have the discretion to believe all, part, or none of the testimony of any witness. *Dorman v. State Bd. of Registration for the Healing Arts*, 62 S.W.3d 446, 455 (Mo. App., W.D., 2001). Even when credibility is a factor in the case, a Commissioner may decide the case after reading the full record but without hearing the evidence. *Angelos*, 90 S.W.3d at 192-94. Spradling attacks Crow's credibility by highlighting alleged inconsistencies in her testimony. For reasons discussed below, we find her credible on the major issues in this case. Our determination of credibility is reflected in our Findings of Fact.

Crow testified that she was with Spradling all night, but on cross-examination admitted that she was not sitting next to him all the time – he was playing pool and doing other things. We do not consider it an inconsistency to say they were together – as in the same location – and yet were not in close proximity at all times.

Spradling attacked Crow's testimony that he was intoxicated by arguing that she admitted she did not see him for the entire period of time they were at the bars and his friend's house. But

her testimony is corroborated by Finke, who testified Spradling appeared intoxicated even later when Finke arrived at the house.

At the hearing, Crow testified that she did not want to get back together with Spradling (Tr. at 49), but she admitted that she and Spradling discussed or texted about reconciliation before the divorce. Crow's testimony that she was "over it" was inconsistent with her attempts at reconciliation, and Spradling points to this inconsistency as another reason her testimony about the incident is not credible. But in a highly emotional situation, people may have inconsistent feelings. We do not think this inconsistency detracts from Crow's credibility on other issues.

Spradling notes that Crow stated she had no motive to lie, but she was obviously upset about the incident and Spradling's cheating on her. Such a statement does not necessarily taint Crow's other testimony. Spradling also alleges Crow admitted to offering to withdraw her cooperation in this case if he would pay a tax bill. But Crow did not admit to this.

Q: Did you ever call or talk to Dan and tell him that you have dirt or shit on him and you shouldn't have to pay the tax bill?

A: Yeah.

Q: Okay. In that same conversation, did you tell him you had been contacted by POST and they wanted you to be a witness in this case?

A: I don't remember when I told him. I thought we talked about it way after that after he brought it up and already knew he was coming to this case.

Q: Did you tell Dan that if he paid the \$1,300 tax bill you wouldn't cooperate with POST people?

A: No.

Q: You never said that?

A: No.

Tr. at 60. Crow did not admit to offering to change her testimony if Spradling paid the tax bill.

Spradling argues that Crow testified at the hearing as to things that occurred that she did not report to the police. But Finke testified about Crow's statement that morning:

Q: When you met Ashley, what did Ashley tell you had happened that night?

A: She told me that she and Dan had been out that night with some friends, they had gone to a couple different places to drink and to eat. Whenever they arrived home, they both laid down to go to sleep and she had checked his cell phone later on after that and discovered there was some text messages about him asking for another girl's number. When she confronted him about it, he grabbed her phone and pushed her; and then when she tried to leave, he pinned her up against the wall, threw her shoes out and in his words get the fuck out I believe is what was said. She was able to eventually get back to her vehicle. As she was in the driveway backing up, he ran out to the car and he punched the passenger side window.

Tr. at 71. We allowed this testimony over a hearsay objection. Spradling argued that this testimony was improper bolstering of Crow's prior statements.

"A prior consistent statement is not hearsay and is admissible if the statement is 'offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.'" *Trident Group, LLC v. Mississippi Valley Roofing, Inc.*, 279 S.W.3d 192, 199 (Mo. App., E.D. 2009) (quoting *Anuhco, Inc. v. Westinghouse Credit Corp.*, 883 S.W.2d 910, 927 (Mo. App., W.D. 1994)). One of Spradling's attacks on Crow's credibility is that she fabricated some of her testimony about the incident after the fact. Spradling attempted to establish this by questioning Crow about discrepancies between her testimony and what she told the police.

Q: And did you tell the police that night that he grabbed the cell phone and threw it against the wall?

A: I don't think I did.

Q: Why not?

A: I don't know. Because that didn't have anything to do with him putting his hands on me. So I didn't put it in the report.

Tr. at 33. Spradling also questions Crow's testimony that he punched the window (Tr. at 46), held her on the couch (Tr. at 47), and told her to go ahead and call the police because they were his friends (Tr. at 65), arguing that these details were not in her written statement to the police.² Spradling is clearly implying that these things did not happen – that Crow embellished her story later. Finke's testimony tended to rebut the implication that Crow fabricated the whole story by demonstrating that Crow told him that night what happened, even if all the details were not in the written report. Thus, Finke's testimony on this point is admissible.

Spradling attacks Crow's testimony that she was afraid of him, yet took time to get her dog before she left. But on cross-examination, Crow refuted this attack with a sensible explanation:

A: I was afraid I didn't know what he was going to do.

Q: Yes, that's what I just said. But you take the time to get the dog?

A: Yeah, because my dog is right there in the living room with us. So I didn't have to go like get him out of his kennel or anything. He was right there. So when Dan threw my shoes out and told me to get the fuck out, I grabbed my shoes and I got my dog because I obviously had to get my purse and car keys to leave. So I got it all at the same time and I left.

Tr. at 41-42.

Spradling argues that Crow testified that she left and called the police at approximately 4:30 a.m., when Finke was dispatched later than that – 5:15 a.m. Spradling argues that this time

² Any other inconsistencies with what was in the written police report are unknown since neither party sought to have it admitted into evidence.

was spent fabricating what she would tell the police. The Director argues that Crow was upset and there was no reason for her to note the exact time. Finke testified that he thought he got the call around 4:45 a.m., but admitted that he was speculating. Tr. at 73. Spradling's counsel then asked, "If your police report says . . . on 1/25/2013 at 5:15 hours I was radio dispatched to Highway E and Somerset Drive, you wouldn't dispute the report?" Finke accepted the time, but there is no evidence of this time since the police report was not admitted into evidence. We have not made any finding as to when Finke was dispatched, and in any event, a short time discrepancy does not undermine Crow's testimony.

Spradling notes that Crow tried to withdraw the charges a few days after the incident. As discussed above, even without considering Crow's testimony about what Spradling said, we accept her testimony that she withdrew the charges "so he could have his job back." Tr. at 21.

Spradling argues that inconsistencies in Crow's testimony render her story incredible. To the contrary, we find that some of these are not even inconsistencies, and those that are do not rise to the level of affecting her credibility. Crow is not a perfect witness, but she is credible and consistent on the main events at issue. Throughout her testimony, Crow was very clear that Spradling pushed her, held her pinned against a wall, and hit her front passenger window.

IV. Cause for Discipline

The Director argues there is cause for discipline under § 590.080.1:

1. The director shall have cause to discipline any peace officer licensee who:
 - (2) Has committed any criminal offense, whether or not a criminal charge has been filed[.]

The Director argues that Spradling committed the criminal offense of domestic assault in violation of § 565.074:

1. A person commits the crime of domestic assault in the third degree if the act involves a family or household member, including any child who is a member of the family or household, as defined in section 455.010 and:

(1) The person attempts to cause or recklessly causes physical injury to such family or household member; or

(3) The person purposely places such family or household member in apprehension of immediate physical injury by any means; or

(5) The person knowingly causes physical contact with such family or household member knowing the other person will regard the contact as offensive[.]

As a spouse, Crow met the definition of a family member. Section 455.010(7).

The Director also argues that Spradling committed the criminal offense of assault in the third degree in violation of § 565.070, RSMo 2000:

1. A person commits the crime of assault in the third degree if:

(1) The person attempts to cause or recklessly causes physical injury to another person; or

(3) The person purposely places another person in apprehension of immediate physical injury; or

(5) The person knowingly causes physical contact with another person knowing the other person will regard the contact as offensive or provocative[.]

We find that the evidence is insufficient for us to find that Spradling attempted to cause or recklessly caused physical injury to Crow. When Spradling shoved her, she did not fall, but stumbled back two steps. Tr. at 38. When Crow described Spradling grabbing her wrists, she

testified that the contact was not very forceful and did not leave marks. Tr. at 16. She testified that he did not shove her, but just pushed her up against the wall. Tr. at 15. Spradling's actions appear to be more of an attempt to restrain Crow than to injure her. While Spradling punched the car's passenger side window very forcefully, this is not evidence that he was attempting to harm Crow. We do not find that Spradling committed the criminal offenses of domestic assault under § 565.074.1(1) or assault in the third degree under § 565.070.1(1), RSMo. 2000.

Spradling, however, shoved Crow, grabbed her wrists and pinned her to a wall, then followed her outside and punched her car window. He was intoxicated and angry, and she felt afraid. The contact was offensive to her. Spradling placed Crow in apprehension of immediate physical injury. A person acts knowingly, or with knowledge, "[w]ith respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result." Section 562.016, RSMo 2000. Even if Spradling was not attempting to harm Crow, his conduct would have been "practically certain" to be frightening and offensive to her, and he would have been aware of that. Spradling committed the criminal offenses of domestic assault under § 565.074.1(3) and (5) and assault in the third degree under § 565.070.1(3) and (5), RSMo 2000.

Summary

There is cause to discipline Spradling under § 590.080.1(2).

SO ORDERED on December 8, 2014.

 Karen A. Winn
KAREN A. WINN
Commissioner